

TITLE 329 SOLID WASTE MANAGEMENT BOARD

LSA Document #05-250

SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST PUBLIC HEARING

On November 21, 2006, the solid waste management board (board) conducted the first public hearing/board meeting concerning the development of new rules at 329 IAC 11.5 for removal of mercury switches from end of life vehicles. Comments were received from the following persons:

Robert Snodgrass, LFR Inc. representing OmniSource Corporation and Capitol City Metals LLC (LFR)
Miriam Dant, Baker & Daniels LLP, representing Nucor Steel and Steel Dynamics (B&D)

Following are the comments received and IDEM's responses thereto.

Comment: The Indiana Legislature adopted P.L. 170-2006 after significant input from all interested parties to address the issue of mercury switches in end-of-life automobiles. The legislation requires automobile manufacturers to submit a plan for implementing the recovery of mercury switches (IC 13-20-17.7-1(a)(2)). The legislation further requires the commissioner of IDEM to issue a public notice and solicit comments on the submitted plan (IC 13-20-17.7-4). We are concerned with the proposal of a new rule placing non-legislated requirements on motor vehicle recyclers until the requirements of the legislation have been met. We respectfully request action on this rule be delayed until after IDEM has at least received, if not actually approved, the required plan from the automobile manufacturers. (LFR)

Response: End of Life Vehicle Solutions (ELVS), a corporation formed by automobile manufacturers to comply with the requirements of P.L. 170-2006, submitted its Mercury Minimization Plan on September 27, 2006. IDEM published that plan with a request for public comments on November 8, 2006 (DIN: 20061108-IR-318060503ONA). The department has until January 25, 2007 to approve the plan. Since plan approval triggers statutory and logistic requirements, IDEM is sensitive to the timing of that approval. There will be a delay from the date motor vehicle recyclers must begin removing switches to the effective date of this rule. IDEM is working to minimize the effects of that delay.

Comment: Section 15 of P.L. 170-2006 adopted language at IC 13-20-17.7-2(a)(5) and (b) that clearly places the responsibility for tracking and reporting the progress of the mercury switch removal program on the motor vehicle manufacturers and IDEM. The specific language reads as follows:

"Chapter 17.7. Mercury Switches in End of Life Vehicles

Sec. 1. (a) ... motor vehicle manufacturers engaged on July 1, 2006, in the business of offering motor vehicles for sale in Indiana shall, individually or collectively:

(1) develop a plan ...

Sec. 2. (a) A plan described in section 1 of this chapter must include the following:

...

(5) Procedures to track the progress of the program, including a description of performance measures to be used and reported to demonstrate that the program is meeting measures of the effectiveness of the program, including the following:

(A) The number of mercury switches collected from end of life vehicles.

(B) The amount of mercury collected.

...

(b) The department shall:

(1) prepare an annual report that includes the information tracked under subsection (a)(5); and

(2) provide the report to:

(A) the legislative council in an electronic format under IC 5-14-6; and

(B) the environmental quality service council."

Additionally, Section 15 of P.L. 170-2006 adopted language at IC 13-20-17.7-2(d) that clearly limits the responsibility of the motor vehicle recycler to maintaining certain records without placing any reporting requirements on the recycler. The specific language reads as follows:

"Chapter 17.7. Mercury Switches in End of Life Vehicles ...

Sec. 5. ...

(d) A motor vehicle recycler or any other person that removes mercury switches in accordance with this section shall maintain records that document the number of:

(1) end of life vehicles the person processed for recycling;

(2) end of life vehicles the person processed that contained mercury switches; and

(3) mercury switches the person collected.

A person that maintains records under this section shall retain the records for at least three (3) years."

The proposal in 329 IAC 11.5-1-4(a) to place reporting requirements on motor vehicle recyclers is clearly an extension to the requirements of P.L. 170-2006 and is not in fact necessary to implement the requirements of the law. We strongly object to any attempt to place additional burdens on the regulated community not specifically authorized by the statute under the guise of "implementation", and respectfully request this entire section of the proposed rule be eliminated. (LFR)

Response: 329 IAC 11.5-1-4(a) reiterates the requirement in IC 13-20-17.7-5(d) for motor vehicle recyclers to record information about the vehicles and switches they process. To implement the statutory requirement and make this information available for use, as well as to reduce costs to Indiana taxpayers of obtaining this information from approximately 800 motor vehicle recyclers, the rule would require motor vehicle recyclers to provide this information to IDEM once each year. IDEM has made every effort to minimize the administrative requirements of this rule and will continue to do so as we implement this program. IDEM will also consider changes to this section to clarify that each entity is responsible for providing the information only for those vehicles from which they remove switches.

Comment: The proposal in 329 IAC 11.5-1-4(a)(3)(A) & (B) to place new and additional recordkeeping requirements on motor vehicle recyclers is clearly an extension to the requirements of P.L. 170-2006 and is not in fact necessary to implement the requirements of the law. We strongly object to any attempt to place additional burdens on the regulated community not specifically authorized by the statute under the guise of "implementation", and respectfully request this entire section of the proposed rule be eliminated. (LFR)

Response: 329 IAC 11.5-1-4(a) reiterates the requirement in IC 13-20-17.7-5(d) for motor vehicle recyclers to record information about the vehicles and switches they process. To implement the statutory requirement and make this information available for use, as well as to reduce costs to Indiana taxpayers of obtaining this information from approximately 800 motor vehicle recyclers, the rule would require motor vehicle recyclers to provide this information to IDEM once each year. IDEM has made every effort to minimize the administrative requirements of this rule and will continue to do so as we implement this program.

Comment: The proposal in 329 IAC 11.5-1-5(a) to allow the commissioner to request either or both paper and electronic submission of the reports should be changed. If these new requirements, that exceed legislative authority, are to be placed on motor vehicle recyclers, the recyclers should not be subject to the whim of the commissioner. We respectfully request the language be changed so if the commissioner requests electronic submission it will be in lieu of paper reports. (LFR)

Response: IDEM will revise this section in the final rule to prevent unnecessary reporting.

Comment: Section 15 of P.L. 170-2006 adopts language at IC 13-20-17.7-5(f) that clearly exempts facilities that accept intentionally flattened, crushed or baled end of life vehicles from liability if switches are still present. The specific language reads as follows:

"Chapter 17.7. Mercury Switches in End of Life Vehicles ...

Sec. 5. ...

(f) A motor vehicle recycler or other person that receives an intentionally flattened, crushed, or baled end of life vehicle may not be considered to be in violation of this section if a mercury switch is found in the vehicle after the person acquires the vehicle."

The proposal in 329 IAC 11.5-1-6(b) to require motor vehicle recyclers to obtain documentation that switches have been removed from intentionally crushed vehicles is clearly an extension beyond the legislative mandate. We respectfully request this language be eliminated bring the rule into accordance with the legislative exclusion. (LFR)

Response: This provision was added as a way to protect the person who receives an intentionally crushed vehicle. The person who crushes the motor vehicle is also a motor vehicle recycler under the statute. IDEM will amend this section to require the person who crushes a vehicle and then transfers it to another person to provide documentation that the switches have been removed.

Comment: We also request that consideration be given to excluding unintentionally damaged vehicles as well. The Continuation of First Notice for this proposed rule indicated there would be a 'clarification of a "motor vehicle that is intentionally **and unintentionally** {emphasis added} flattened, crushed, or baled"', however, no such clarification has been provided. The legislature clearly recognized that it is impractical to access switches on intentionally mangled cars and a similar allowance should be made for

unintentionally damaged end of life vehicles, such as those involved in serious accidents, where the hood or truck has been severely damaged making access to switches impracticable. (LFR)

Response: An exclusion for “unintentionally” flattened, crushed, or baled motor vehicles was not a part of the statute, and adding such an exclusion would exceed the authority of the statute. Flattening, crushing and baling are specific activities conducted by the motor vehicle recycling industry. Each of these activities would clearly make any switches in the vehicle inaccessible. It is conceivable that a recycler could mistakenly or inadvertently flatten, crush or bale an end-of-life vehicle before the switches are removed, but each of those activities is intentional. Damage from motor vehicle accidents is very different from those activities. The term “severe damage” suggested by the commentor is variable and could range from a vehicle that is so badly damaged that it is unrecognizable to a vehicle with a damaged fender. Such an provision would exclude a large percentage of end-of-life vehicles from the rule, which is not the intent of the statute. “Unintentionally flattened, crushed or baled” cannot be defined specifically enough to constitute an ascertainable standard as required by Indiana law.

Comment: The proposal in 329 IAC 11.5-1-7 to allow the rule to stay in effect beyond the expiration of the legislation should be changed to repeal the rule immediately upon expiration of the statutory authority. (LFR)

Response: The intent of this section is to allow the provisions for payments to recyclers to continue for a short time beyond the expiration of the statute to allow time to ship any remaining switches and receive payment for them. Having the rule expire at the same time as the statutory requirement to remove the switches would leave many recyclers holding mercury switches for which no bounty could be legally paid and for which industry-funded shipping and processing may not be available.

Comment: The proposal in 329 IAC 11.5-2-2 establishes a definition for the containers to be provided to motor vehicle recyclers by automobile manufacturers, but there has not yet been a plan submitted by automobile manufacturers as required by the statute. In fact, the deadline for initial submission of a plan by the automobile manufacturers has not yet arrived. Until the specified plan is at least submitted for comment, it seems premature to adopt definitions that will apply to motor vehicle recyclers when the details of the manufacturers’ plan are unknown. We respectfully request all work on this rule be placed on hold until such time as the automobile manufactures plans have at least been initially submitted. (LFR)

Response: End of Life Vehicle Solutions (ELVS), a corporation formed by automobile manufacturers to comply with the requirements of P.L. 170-2006, submitted its Mercury Minimization Plan on September 27, 2006, before the statutory deadline of October 1, 2006. IDEM published that plan with a request for public comments on November 8, 2006 (DIN: 20061108-IR-318060503ONA). The department has until January 25, 2007 to approve the plan. Since plan approval triggers statutory and logistic requirements, IDEM is sensitive to the timing of that approval. There will be a delay from the date motor vehicle recyclers must begin removing switches to the effective date of this rule when payments begin. IDEM is working to minimize the effects of that delay. The only non-statutory definition in this rule clarifies the term “container” as it is used elsewhere in the rule.

Comment: The proposal in 329 IAC 11.5-2-2(2) of the definition states the containers to be supplied by the manufacturers must comply with the universal waste regulations for transportation. This should be modified to include a requirement that the containers must also meet the storage requirements for universal waste. (LFR)

Response: The requirements for storage and transportation of universal waste are fully described in 40 CFR 273 as incorporated by reference in 329 IAC 3.1. The ELVS plan and the rule are based on the universal waste rule. Motor vehicle recyclers who comply with the rule and the ELVS plan will be in compliance with the universal waste rule. Further regulation in this rule would not be necessary or helpful.

Comment: The proposal in 329 IAC 11.5-2-2(2) and 329 IAC 11.5-4-1(d) indicate the mercury switches will be managed under the requirements of the Universal Waste Rules, but Indiana has not yet adopted the revisions to the Federal Hazardous Waste Rules that incorporate mercury containing devices into the state rules. Until such time as the updated Hazardous Waste Rules are adopted, we respectfully request some assurance be placed in this proposed rule language that handling the mercury switches in accordance with the Federal requirements will satisfy all state requirements and will preclude anyone, including both the state and private citizens, from filing suit for failing to comply with the currently more stringent state requirements. (LFR)

Response: The federal amendment adding mercury containing equipment to the universal waste regulations at 40 CFR 273 (70 FR 45508-45522, August 5, 2005) was adopted in the 2005 Hazardous

Waste Annual Update (LSA Document #05-66). That rule was effective on September 5, 2006 (DIN: 20060712-IR-329050066FRA, July 12, 2006).

Comment: There is no requirement for automobile manufacturers to provide the containers. Supposedly this will be a required part of the plan the automobile manufacturers will be submitting. We respectfully request a provision be added to require the automobile manufacturers to provide the containers and state the containers must meet the storage and transportation requirements for universal waste and that motor vehicle recyclers will not be held accountable if such containers are not provided by the automobile manufacturers. (LFR)

Response: IC 13-20-17.7-2 (added by P.L. 170-2006) requires automobile manufacturers to provide containers for collecting and storing mercury switches. The automobile manufacturers are fulfilling this requirement through their contractor (ELVS). Paragraph 2 of the ELVS plan discusses in detail the containers they will provide. A primary function of ELVS is to make these containers available to every known motor vehicle recycler. IDEM is working with the Indiana Bureau of Motor Vehicles to provide information on Indiana motor vehicle recyclers to ELVS in a timely manner. The ELVS Mercury Minimization Plan was received on September 27, 2006. IDEM published that plan with a request for public comments on November 8, 2006 (DIN: 20061108-IR-318060503ONA).

Comment: Section 15 of P.L. 170-2006 adopted language at IC 13-20-17.7-2(d) that clearly limits the responsibility of the motor vehicle recycler to maintaining certain records without placing any reporting requirements on the recycler. The specific language reads as follows:

"Chapter 17.7. Mercury Switches in End of Life Vehicles . . .

Sec. 5. . . .

(d) A motor vehicle recycler or any other person that removes mercury switches in accordance with this section shall maintain records that document the number of: (1) end of life vehicles the person processed for recycling; (2) end of life vehicles the person processed that contained mercury switches; and (3) mercury switches the person collected. A person that maintains records under this section shall retain the records for at least three (3) years."

The proposal at 329 IAC 11.5-5-1(a)(2) to place new and additional recordkeeping and reporting requirements on motor vehicle recyclers in order to receive compensation for switch removal is clearly an extension to the requirements of P.L. 170-2006 and is not in fact necessary to implement the requirements of the law. A simple manifest documenting the number of mercury switches sent off-site for recycling should be sufficient for reimbursement. We strongly object to any attempt to place additional burdens on the regulated community not specifically authorized by the statute under the guise of "implementation", and respectfully request this entire section of the proposed rule be eliminated. (LFR)

Response: Motor vehicle recyclers are required by Indiana law to maintain records on every motor vehicle they receive. The information required by this rule is a subset of the information that motor vehicle recyclers already obtain. Motor vehicle recyclers will receive public funds in payment for removing mercury switches. It is imperative that IDEM collect a certain amount of information about the switches and the sources of those switches to justify those payments. The information required in this rule is the minimum required to support payments to recyclers, and is required to effectively audit claims for payment.

Comment: We strongly support the proposal at 329 IAC 11.5-5-1(c) to establish the fees for each mercury switch removed. However, we would like to see some indication of the level of funding the commissioner plans to appropriate to fund the program. At present, it is entirely unclear if any money will actually be placed into the fund. (LFR)

Response: P.L. 170-2006 provided that payments for mercury switches be made from the solid waste management fund. The actual dollar amount available for those payments will be determined by the commissioner based on the available funds and the priorities for all required uses of the fund.

Comment: I want to support the preliminary adoption of the rule. We think it's important for the policies and procedures and the standards for the mercury switch recovery program to be in place as quickly as possible. In particular, we support the provisions of the rule that allow for the payment of the bounties, because that really is going to be the key to getting the switches removed in a good enough manner that we have a functioning program in Indiana. (B&D)

Response: IDEM agrees.